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No. 02-595

IN THE

Supreme Court Of The United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF COL. WM. DENSBERGER, *et al.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to the United States under military and civilian government contracts. The Chamber regularly advocates its members' views in the Supreme Court and other appellate forums. It initiates and enters litigation involving issues of national concern to the American business community.

We write as an *amicus curiae* to address the interests of the government contracting community, many of whose members are members of the Chamber. Our interest in critical government contracting issues has led to *amicus* presentations to this Court in numerous government contractor product liability cases, including *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The decision of the United States Court of Appeals for the Second Circuit in the instant case has serious adverse implications for Chamber members doing business with the government. The troublesome conflict among the circuits as to the scope of the government contractor defense is set forth by Petitioner and will not be repeated. Rather, this brief

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[1] Petitioner and Respondents have consented to the filing of this brief, and their letters of consent are filed herewith. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

addresses how the Second Circuit's misreading of the government contractor defense erodes the boundary of protection for discretionary government decisions to deploy, use and update military systems.

The Second Circuit failed to give any weight to the unique environment in which defense contracting takes place. It compounded this failure by ignoring an important line of cases showing that long-term use of a military product constitutes acceptance of that product (including design weaknesses) as a protected, discretionary government act. The result is a decision that has negative consequences for government contractors and the nation's defense efforts.

The decision below is of great concern to the Chamber in that it undermines the carefully articulated baseline of protection for federal interests embodied in the government contractor defense. Without clarification by this Court, those interests will be eroded, and civilian and military contractors assisting in implementing government decisions may face unpredictable liability merely because a claimant files suit before a court that has erected obstacles to the full protections set forth in *Boyle*.

SUMMARY OF ARGUMENT

This case involves the fatal crash of a Blackhawk military helicopter which occurred after the Army decided to "fit" it with supplemental fuel tanks. The key issue in this case is whether the government's decision to deploy this mature weapon system with a new fuel supply, but without first performing supplemental testing to create a new "flight envelope," can create commercial liability on the part of the contractor when an accident occurs.

In addressing this issue, the court below gave no weight to the unique, government-controlled environment in which

weapons procurement occurs, and thus misconstrued the philosophical and logical bases of the government contractor defense. In the procurement environment, the government exercises its plenary authority to make unilateral, uniquely governmental decisions regarding the design, purchase, deployment and "use environment" of weapons systems. Unlike consumer products, these systems are designed to be lethal and operate in hostile combat environments, and the notion of "safety" is a highly relative one to be balanced by the government against other considerations such as combat efficacy, maneuverability, weight, range, "hardness" under attack, and cost. This balancing of considerations is a quintessentially government function.

The court below then compounded its error by failing to recognize the strong body of authority illustrating that post-sale, long-term use of government-ordered systems constitutes *de facto* approval of the system's design. Where, as here, the government has knowledge of a product's inherent characteristics, including limitations and potential safety issues, but continues to accept and use the product, choosing not to change the design, that decision is a discretionary act for which neither the government nor the contractor can be held liable.

The decision below has created a situation in which the legal and financial consequences of governmental decisions can come to rest on private parties that have no unilateral authority or discretion. Where the government has complete control over the deployment, testing and use environment of a weapon, as well as an extremely sophisticated customer, private contractor liability undermines the contractor defense, with negative effects on military and civilian government contracting, defense planning, and the nation's developing homeland security effort.

REASONS FOR GRANTING THE PETITION

I. GOVERNMENT CONTRACTING TAKES PLACE IN A UNIQUE ENVIRONMENT IN WHICH THE CONTRACTOR HAS NO UNILATERAL DISCRETION TO ALTER GOVERNMENT DECISIONS REGARDING DESIGN, TESTING AND DEPLOYMENT

The Second Circuit exacerbated an important inter-circuit conflict by failing to recognize the unique federal nature of the environment in which the Blackhawk helicopter and other major weapon systems are conceived, designed, built, refit and operated. A review of this environment and the legal and practical realities surrounding it illustrates that decisions to design, build and deploy weapons are discretionary government decisions made in furtherance of the national defense, not commercial decisions made by a military contractor.

In the military procurement environment, government control over weapons design is plenary. The government chooses its products in a process informed by strict, mandatory government standards and specifications, and competing discretionary goals, be they strategic, defensive, financial or even political. The government evaluates systems with a sophisticated design and testing operation of its own.

Tradeoffs between safety, efficacy and other factors are the very essence of military procurement, and similar tradeoffs apply to civilian products purchased by the government as well. Deployment of the best military helicopters will involve tradeoffs of stability versus maneuverability, size versus speed, payload versus range. Troop carriers are designed to address many considerations, including size, speed, mileage, hill-climbing ability, cost and many other

factors. The light tank may exchange armor for weight, and sacrifice size and even survivability under some conditions in order to fit into existing cargo planes. Each of these decisions, as well as the decision to deploy a weapon in particular environments, potentially placing service personnel in harm's way, involves many considerations, of which safety is only one factor.

At a very basic level, the military imposes its will on contractors through requiring contractors to build government products subject to detailed military specifications (MILSPECS), and military standards (MILSTDS), all under the authority of the Federal Acquisition Regulation (FAR), the Defense FAR Supplement (DFARS), and even subsidiary acquisition regulations promulgated by the individual military services. On a higher level, the government decides, based on military and political considerations, which weapons and materiel to purchase and deploy. Unlike a commercial entity, the government can decide to produce (and order a contractor to produce) products with no commercial application, such as depleted uranium bullets, insulation containing asbestos, or even a potentially dangerous herbicide with no product information or warnings. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194, 199, 201 (2d Cir. 1987) (decision not to warn servicemen of potential risks of Agent Orange is a discretionary government decision). The Blackhawk, which was designed entirely for military applications and has no civilian counterpart, falls neatly into the category of a purely military product.

The law of government contracting clearly recognizes the government's primacy over the design and deployment of weapons systems, even when the contractor is a participant in the planning and design process. A good historical example is *Hickman Sea Sled Company,* ASBCA No. 3008, 57-1 BCA ¶ 1177. In *Hickman*, the Armed Services Board

of Contract Appeals (ASBCA) found that the government was responsible for specifications concerning the propellers of the subject sea sled. Although the contractor wrote the proposed propeller specifications, the government's adoption of them meant that "the Government approved the specifications and that Appellant was bound to follow the specifications in producing a prototype Sea Sled." *Id.* at p. 3213. The Board also found that the contract "bound Appellant in any event to follow the specifications in reaching the end results of the contract to the extent that there were any specification provisions covering a given subject." *Id.*

A similar situation arose in *E. L. Cournand & Co., Inc.*, ASBCA No. 2955, 60-2 BCA ¶ 2840. In that case, the government's design specifications (which were reached in coordination with the contractor and adopted by the government) were impossible to fulfill. The ASBCA found that the contractor could not be forced to bear that risk, quoting "the settled principle of law that in the absence of exceptional circumstances, a contractor has the right to rely on the Government's specifications and can be charged with no responsibility for their inadequacy." *Id.* at p. 14,759.

This theme is an enduring one in government contracting. As the ASBCA has flatly stated: "When the Government contracts for supplies to be manufactured in accordance with Government specifications, ordinarily there is implied warranty on the part of the Government that, if the specifications are followed, a satisfactory product will result." *Appeal of Szemco, Inc.*, ASBCA No. 9892, 1964 ASBCA Lexis 1008, at *28.

This logic is not limited to administrative contracting boards. Indeed, for nearly a century, this Court has approved the logic of the government bearing responsibility for the duties and burdens it imposes on contractors. In *United*

States v. Spearin, 248 U.S. 132 (1918), the Court considered the plight of the government contractor building a Navy dry dock. The contractor was required to (and did) follow detailed government specifications for the relocation of a sewer. *Id.* at 134. The entire project flooded, causing extensive damage. *Id.*

In considering the contractor's claims, Justice Brandeis cited a rule with application here: "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications . . . the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate." *Id.* at 136, 137.

The modern-day application of these rules clearly illustrates the scope of the government's discretion in determining what weapons or products to deploy, and in deciding how to deal with safety and "use environment" issues. *See Fairchild Republic Co. v. United States,* 712 F. Supp. 711 (S. D. Ill. 1988) (military's decision to allow asbestos dust to remain in work area, and to require worker to use asbestos tape, was a discretionary government decision under FTCA); *Maas v. United States*, 94 F.3d 291, 297 (7th Cir. 1996) (soldiers exposed to radiation during recovery of a nuclear weapon); *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 996-98 (9th Cir. 1987) (radiation exposure during tests of nuclear weapons); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194, 201 (2d Cir. 1987) (exposure of servicemen to potentially dangerous herbicide, without warnings or labeling).

This history clarifies the scope of the Court's recognition in *Boyle* that government contractors should be protected

from third-party tort claims in certain "uniquely federal" situations. 487 U.S. at 505. The Court analogized the position of a government contractor facing third-party tort claims to the civil liability of federal officers for actions taken in the course of their official duties, and determined that in both situations "there is obviously implicated the same interest in getting the Government's work done." *Id.*

In explaining the federal interest in shielding government contractors from liability, the Court quoted and extended its holding in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). In *Yearsley*, which involved a commercial performance contract for dredging services, the Court found that a government contractor has no liability in tort for damages caused by a dredging operation when the contractor followed government direction, stating broadly that "there is no liability on the part of the contractor for executing [the government's] will," 309 U.S. at 21. In *Boyle*, the Court extended this logic to procurement contractors, finding that "[t]he federal interest justifying this holding [in a third-party tort action] surely exists as much in procurement contracts as in performance contracts." *Boyle*, 487 U.S. at 506.

Notwithstanding that *Boyle* was an action between two private parties, the Court found that the displacement of state tort law was justified by the government's interest in procurement: "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be

directly affected." *Id.*[2] The Court concluded: "we think that the character of the jet engines the Government orders for its fighter jets cannot be regulated by state court law, no more in suits by civilians than in suits by members of the Armed Services." *Boyle*, 487 U.S. at 511.

This statement from *Boyle* has particular resonance in the case of government-ordered, post-sale modification of mature weapons systems. Such governmental decisions can perhaps be evaluated under military, strategic, or political standards. However, their "uniquely federal" nature makes second-guessing under state tort law impossible. Connecticut tort law can no more provide a rational evaluation of the Army's decisions on fuel tanks than it can judge whether the military should have deployed the Blackhawk in Europe at all, or should have decided to extend the Blackhawk's range and lift capabilities. Indeed, "the application to military weapons producers of ordinary state law tort liability rules would discourage those manufacturers from providing necessary assistance in the product design and development process, would undermine military discipline by authorizing the second-guessing of weapons design and procurement decisions, and would increase the manufacturer's uncertainty as to potential liability, thus increasing the costs to the United States." *Supplemental Memorandum of the United States as Amicus Curiae* at 4,

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[2] Extending its holding regarding liability even beyond the rules set forth in *Feres v. United States*, 340 U.S. 135 (1950), the Court clarified that the government interests at stake were of such consequence that the government contractor defense would apply not only to service-related injuries, but to civilian injuries claimed to be caused by military systems. *Boyle*, 487 U.S. at 506.

filed in *Boyle v. United Technologies Corp.*, No. 86-492 (U.S. 1987).

The Court's broad mandate in *Boyle* simply cannot be reconciled with the views of the Second Circuit, which "very much doubt[ed] that the government contractor defense is relevant," in a case involving a military helicopter transporting military personnel on official government business at an American military base overseas, *United Technologies Corp. v. Densberger*, 297 F.3d 66, 75, *petition for cert. filed* __ U.S.L.W. __ (U.S., Oct. 18, 2002) (No. 02-575), but rather implied that Connecticut had a greater interest than the federal government in the outcome of military actions on foreign soil.

Nor can the Court's broad mandate in *Boyle* be squared with the Second Circuit's view that the government contractor defense "would seem to make sense only when the government, for reasons of federal interest, chooses to limit the warnings provided by the seller *to end-users,*" i.e., require the government to order United Technologies not to do something both parties already have stipulated it had no duty to do. *Id.* That is a misreading of *Boyle*, for the government decisions which resulted in the alleged inability of the Blackhawk to retain stability in flight in every possible situation were discretionary government decisions made in the context of a government procurement contract. Under government contract law, under *Spearin*, and under *Boyle*, no contractor liability should result.

The current procurement environment involves not only military and civilian products manufactured for the government, but also products and services developed to assist in the government's homeland security effort. Many of these products involve "cutting-edge" technology, and have no civilian counterparts. They can be deployed in potentially dangerous situations, in situations in which the

government chooses to project lethal force, or in homeland security situations (such as interdicting terrorist attacks) in which failure can have almost unimaginable consequences. If contractors are not protected from liability arising from these governmental decisions, many contractors will choose not to assist in the government's work, and those that remain will charge the government higher prices, thus indirectly placing liability back on the government.

II. POST-SALE, LONG-TERM USE OF GOVERNMENT-ORDERED EQUIPMENT IMPLIES DE FACTO, DISCRETIONARY GOVERNMENT APPROVAL OF THE EQUIPMENT DESIGN

A second reason why this case should be heard is that the Second Circuit, in rejecting the better-reasoned cases finding the exercise of government discretion through government involvement in warnings, also ignored the line of cases, controlling here, in which the government's long-term use and acceptance of equipment constituted *de facto* approval of the equipment design, including its warnings. That concept has particular relevance here, as the Blackhawk helicopter is a "mature" weapon system well-known, and best-known, to the government through decades of use, and the government, not the contractor, is in the best position to determine the potential effects – both good and bad – of equipment modification.[3]

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[3] It also bears noting that the Blackhawk, like many sophisticated weapons systems, is a "compound system." It is not merely an air taxi; it is also an offensive weapon with passive and active protection devices, sophisticated communications, and myriad electronic devices focused on "C4ISR" (command, control, communications, computerization, intelligence, surveillance and reconnaissance) that were the work of many other contractors, and the government.

The leading case in this area is *Ramey v. Martin-Baker Aircraft Co. Ltd.*, 874 F.2d 946 (4th Cir. 1989). In *Ramey*, the court applied the government contractor defense to dismiss a negligence action against a aircraft ejection seat contractor, Martin-Baker, when a maintenance worker was injured by accidental operation of the seat. The court found that the seat conformed to Navy specifications, and that the Navy was aware of its potential hazards:

> [T]here is no doubt that the seat is potentially dangerous to maintenance personnel. . . . We conclude, however, that the Navy was well aware of the seat's harmful propensities before Ramey's mishap.
>
> We have observed that the Navy had F-18s in fleet service prior to the time of Ramey's accident. The record of message traffic among Navy officers and agencies reveals full knowledge of the danger implicit in prevailing maintenance protocols. While we regret that this recognition did not benefit Ramey, we find no issue that Martin-Baker could have apprised the Navy of any material circumstances not already known to it. Considering as we do that the evidence does not leave the applicability of the military contractor defense at issue, we agree with the district court that the defense insulates Martin-Baker from liability for Ramey's injuries.

Id. at 951 (footnote omitted).

A similar situation, and a similar result, occurred in *Harduvel v. General Dynamics Corporation*, 878 F.2d 1311 (11th Cir. 1989), which arose out of the fatal crash of an F-16 "Fighting Falcon" aircraft near Kunsan Air Base in South Korea. The pilot's family and estate claimed the crash was the result of electrical failure due to "chafing" of electrical wires inside the plane. *Id.* at 1314.

In applying *Boyle*, the Eleventh Circuit addressed whether the claimed defect in the airplane – wire chafing – was a design issue or a manufacturing defect. If "a defect is one inherent in the product or system that the government has approved, it will be covered by the defense," whereas a mere claim of shoddy workmanship implicated no federal interest. *Id.* at 1317.

The *Harduvel* court found that the design of the F-16 "was a result of 'continuous back and forth' between the Air Force and General Dynamics," and that this cooperative process not only met the standard for reasonably precise government specifications, but also implied that these design standards (including a well-known propensity for wire chafing) were met. *Id.* at 1320-21. The 11th Circuit found that because "the Air Force knew of wire chafing . . . well before Harduvel's crash," and was "plainly aware of the chafing problem in the F-16 generally" but in spite of this knowledge continued to fly the hundreds of F-16s in operation and purchase new ones, the government contractor defense applied. *Id.* at 1321-22.

The Sixth Circuit recently considered this issue in *Landgraf v. McDonnell Douglas Helicopter Co.*, 993 F.2d 558 (6th Cir. 1993). There, the court explained how the government, by relaxing a military contract standard for helicopter rotor blade clearance but continuing to accept helicopters, created a situation of government approval of reasonably precise specifications.

The court found that the history of the development of the OH-6A helicopter, including "several years of planning, the delivery of prototype aircraft and testing by both the FAA and the Army," and "progressive[] and continuous[]" Army

inspections throughout production indicated that the Army had made a discretionary decision to relax this contractual requirement. *Id.* at 562.[4] "By permitting production to continue without any change in design following the 1969 tests, the Army made a discretionary decision not to insist on the [rotor] clearance recommended in [the contractual military standard]." *Id.* at 564.

At the base of these cases is the idea that the government, in choosing weapon systems, has the discretion to choose the systems that will best accomplish the government's military goals, and is in the best position to know of weaknesses or potential safety issues. In deploying these weapons, the government may in the exercise of its discretion choose to act or not act regarding known potential safety issues. Either way, the government's decision (and the actions of the contractor doing the government's work) should not be subject to attack under state tort law.

In the instant case, this authority should have great weight. As the record shows, the Blackhawk helicopter had been in military service for many years, and its characteristics were well-known to the government. A government decision to make a change in the potential mission of the helicopter (i.e., to add payload, extend range and augment missile-carrying capacity), without conducting tests regarding the new flight envelope is clearly a discretionary government decision, and should not be subjected to analysis or second-guessing under state tort law, even if the government made the decision not to test without considering all of the alternative avenues of action. "[A] product conforms to

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[4] The record also indicated that, just as in the instant case, helicopter manufacturer Hughes "recommended additional testing" for the tail rotor. *Id.* at 563.

reasonably precise specifications if it satisfies 'an intended configuration' even if it 'may produce unintended and unwanted results.'" *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989), *quoting Harduvel,* 878 F.2d at 1317.

These cases merely underscore the scope of the government's discretion in choosing military hardware. As this Court said in *United States v. Varig Airlines,* 467 U.S. 797, 808 (1984) the "discretionary function exception" of the Federal Tort Claims Act "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." The scope of that discretion is essentially unfettered, provided that the challenged act involves an element of judgment, and is based on public policy considerations. *Baldassaro v. United States*, 64 F.3d 206, 208, 210-11 (5th Cir. 1995). What is at issue is the nature of the conduct, not the nature of the actor. *Id.*

In other words, the test of a discretionary act "is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion." *Smith v. Johns Manville Corp.*, 795 F.2d 301, 308-09 (3rd Cir. 1986) (emphasis added). *See Andrade v. United States*, 116 F. Supp. 2d 778, 788 (W.D. Tex. 2000) (discretionary function exception includes "the failure to consider possible alternatives").

The protection afforded by federal courts to discretionary government acts in the military operations context is simply incompatible with the prescribe/proscribe standard set forth by the Second Circuit below. Indeed, were this Court to adopt the prescribe/proscribe standard, it would displace the military's discretionary decisions regarding warnings, and

replace it with a judicially-created mandate that the government must "seriously consider" and issue orders regarding warnings. That standard, wholly inconsistent with *Boyle*, would substitute the judgment of courts for that of military decisionmakers, and ultimately and ineluctably draw the courts into making value judgments about the kinds and quality of the government's decision making regarding weapons systems. As the Court concluded in *Boyle*:

> The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

Boyle, 487 U.S. at 513.

The decision below oversteps the protective boundaries of *Boyle* by creating "back door" liability for discretionary government decisions that could not be challenged directly. It increases the costs of government contractors and impedes the government's work – whether it be delivering mail, providing for the national defense or protecting homeland security – by creating barriers to defense procurement, since only contractors willing and able to work in a situation of uncertain, almost unlimited liability will contract with the government.

CONCLUSION

The decision below misconstrues the government contractor defense in a manner that has serious, negative implications not only for contractors, but for military discipline, defense readiness and national security overall. It not only permits but encourages second guessing of

government defense and national security decisions, creating civil torts out of decisions made by military and government officers.

This Court's guidance on these issues in *Boyle* has been undermined and confused by intervening decisions by the circuits which have created doubt as to the appropriate scope of the government contractor defense. The Second Circuit's grudging interpretation of *Boyle* below adds to this confusion by deepening the conflict with the better-reasoned rules of several circuits and the reasoning of *Boyle* itself. The Court should grant the petition for a writ of certiorari, and uphold and clarify its guidance in Boyle that discretionary decisions by the government will not result in liability to the government or those who carry out the government's will.

Respectfully submitted,

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